

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6111

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and
Trustee of the Last Will and Testament
of Margaret C. Duncan, Deceased,

Plaintiff-Appellant

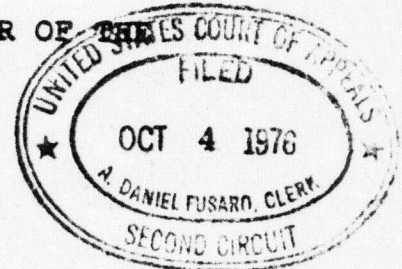
v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE DECISION AND ORDER OF
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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IN THE UNITED STATES COURT OF APPEALS
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No. 76-6111

SAMUEL D. MAGAVERN, As Executor and
Trustee of the Last Will and Testament
of Margaret C. Duncan, Deceased,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE DECISION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court was correct in determining that Thomas W. Doran had a right to property as a beneficiary of a testamentary trust, and, therefore, that that property right was subject to the Government's tax lien and subsequent levy.

STATEMENT OF THE CASE

This case involves income withholding and F.I.C.A. taxes in the amount of \$2,305.50. (R. 59.)^{1/} The decision and order of the District Court was entered on June 8, 1976. (R. 46-48.) The amended order and final judgment were entered on July 15, 1976. (R. 62-63.) Taxpayer filed a timely notice of appeal on July 15, 1976. (R. 2a.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

The facts pertinent to this appeal are as follows:

Margaret C. Duncan died in 1965. (R. 47.) Mrs. Duncan's will left the residue of her estate, in trust, for her husband, her son, Thomas W. Doran, and the children and grandchildren of Thomas W. Doran. (R. 47.) Article Third of Margaret C. Duncan's will read as follows (R. 22):

ARTICLE THIRD: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, (including property over which I have the power of appointment) I give, devise and bequeath to my Trustee or Trustees, as the case may be, hereinafter named, IN TRUST, NEVERTHELESS, for the following uses and upon the following terms and conditions:-

1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal (even to the point of exhaustion thereof), or both, thereof he

1/ "R." references are to the separately bound record appendix.

shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group.

The executor and trustee under the will of Margaret C. Duncan is Samuel D. Magavern, the appellant in this action. (R. 34.) Thomas W. Doran, the taxpayer herein, had assessed against him federal taxes and interest in the aggregate amount of \$112,753.51; on November 7, 1974, a total of \$108,303.06, plus penalties and interest remained unpaid. (R. 7.) The breakdown of this amount was as follows (R. 7):

Period	Type Tax	Date of Assessment	Unpaid Balance
1965	Income	10/2/76	\$1,182.98
1966	Income	5/19/67	4,804.48
1969	Income	6/5/70	6,809.56
1970	Income	7/31/71	248.77
1Q & 2Q 1965	W/H & FICA	12/1/72	1,441.82
2Q-4Q 1968	W/H & FICA	11/16/72	48,857.67
1971	W/H & FICA	12/1/72	44,958.68
			<hr/> \$ 108,303.96

During the period of January 1, 1968, through October 31, 1973, the trustee made the following payments from the Margaret C. Duncan Trust to taxpayer (R. 34):

<u>Year</u>	<u>Amount of Distribution</u>
1968	\$1,500.00
1969	2,000.00
1970	1,039.61
1971	3,000.00
1/1/72 - 10/31/72	2,000.00
11/1/72 - 10/31/73	3,500.00

On December 5, 1973, the trustee was served with a notice of levy under Sections 6321 and 6331 of the Internal Revenue Code of 1954 (26 U.S.C.) by the Internal Revenue Service. (R. 48.) The levy covered "all property and rights to property * * * belonging to" Thomas W. Doran. (R. 48.) The trustee refused to honor the levy on the ground that, under the terms of the trust, no monies were due and owing to taxpayer at the time of service of the levy. (R. 35.) The trustee obtained an order to show cause, in the Surrogate's Court of Erie County, New York, why the Internal Revenue Service's levy should not be vacated, cancelled and discharged. (R. 35.) In the proceeding in the Surrogate's Court, the Government appeared specially and filed a memorandum in opposition to jurisdiction over the United States. (R. 36.) On December 27, 1974, the Surrogate filed a decision holding that he lacked jurisdiction over the United States, but stated that he would treat the matter as an ex parte will construction matter, and went on to rule that the taxpayer had no rights in property of the trust that could be reached by levy under Section 6331 of the Internal Revenue Code. (R. 21-28.)

While the will construction was before the Surrogate's Court, the trustee commenced the instant action on August 23, 1974, in the United States District Court under Section 7426 (a)(1) of the Internal Revenue Code seeking to enjoin the enforcement of the levy and its ultimate cancellation. (R. 3-5.) The Government answered, and counterclaimed for an order foreclosing the tax liens and requiring the trustee to pay over to the

Government all money and property due to taxpayer by virtue of his interest in the trust. (R. 6-9.) Taxpayer died on February 19, 1975. (R. 36.) Appellant-trustee then moved for summary judgment based upon the decision of the Surrogate's Court. (R. 14-15.) The Government filed its opposition to the appellant-trustee's motion for summary judgment and cross-moved for summary judgment on the issue of taxpayer's property rights in the trust. (R. 33-41.) The District Court denied the appellant-trustee's motion and in granting the Government's cross-motion held that the taxpayer had rights to property in the trust to which the tax levy could attach. (R. 46-58.) Judgment was thus entered in favor of the Government in the amount of \$2,305.50, an amount stipulated (R. 59) to by the parties herein. The appellant has appealed from that judgment.

SUMMARY OF ARGUMENT

The Internal Revenue Code provides, in pertinent part, that a lien shall attach in favor of the United States on "all property and rights to property" of any person who refuses or neglects to pay taxes for which he is liable. The Code also provides that the Secretary or his delegate may levy upon "all property or rights to property" belonging to taxpayer upon which a lien exists. Although federal law determines the priority of competing liens, the federal courts must nonetheless look to state law to determine what property or rights to property exist.

Here, appellant contends that taxpayer had, under state law, no property or rights to property in his mother's trust to which the Government's lien could attach. Appellant bases this contention on a decision of the State Surrogate's Court dealing with the construction of the trust agreement. Appellant's reliance on this case is greatly misplaced. The Surrogate's Court considered the matter as an ex parte will construction after first determining that it was without jurisdiction over the United States. Thus, not having been a party to that court's proceeding, the United States is not bound by its ruling.

The Surrogate's Court ruling on the will construction was also not binding upon the Federal District Court since the Supreme Court has long ruled that in federal tax matters, as in diversity matters, where state law is relevant, the federal

courts are not bound by the decisions of state courts other than the highest court of the state. In those instances where the state court has not spoken on the issue before the federal court, the federal court sits "as a state court" deciding the matter as it believes the highest state court would.

Since the Surrogate's Court decision was not binding on the federal court, and the New York Court of Appeals had never addressed the precise issue herein, the District Court was proper in deciding the issue for itself after giving "proper regard" to factors decided by the state courts bearing on the matter before it. It's decision on the issue of whether taxpayer had a property right as a beneficiary of his mother's trust was correct and amply supported by New York law. The trust instrument, by mandatory language, requires the trustee to pay at least some income to the entire class of beneficiaries under the will. In circumstances such as this, state law is well established in providing an aggrieved beneficiary with a cause of action against a trustee for not administering the trust as directed by the trust instrument. And, the State Court of Appeals has expressed the state's policy regarding the term "support" as it relates to one's tax liability by stating that a trustee must consider a beneficiary's tax obligations in determining support payments under the terms of a trust.

The decision of the District Court was correct and should be affirmed on appeal.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE TAXPAYER HAD A LEGALLY ENFORCEABLE RIGHT, UNDER STATE LAW, IN THE INCOME AND CORPUS OF THE TRUST IN QUESTION, AND THAT THEREFORE, THE FEDERAL TAX LIENS ARISING OUT OF THE ASSESSMENT AGAINST THE TAXPAYER WERE VALID AS WAS THE SUBSEQUENT LEVY AGAINST THE TRUSTEE OF THE TRUST

A. Introduction

Section 6321 of the Internal Revenue Code of 1954, Appendix, infra, provides that a lien shall attach in favor of the United States on all property and rights to property of any person who neglects or refuses, after demand, to pay any taxes for which he is liable. Section 6322, Appendix, infra, provides that the lien imposed by Section 6321 shall arise at the time the assessment against the taxpayer is made. Section 6331(a), Appendix, infra, provides that the Secretary or his delegate is authorized to collect unpaid tax assessments by levying upon all property or rights to property belonging to the taxpayer or upon which a lien exists. Section 6332(a), Appendix, infra, provides that any person in possession of property or rights to property subject to a levy shall, upon receipt of such levy surrender such property or rights. Section 6332(c) imposes personal liability for failure to comply. And, the determination of which liens are to prevail necessarily requires the application of federal law. Aquilino v. United States, 363 U.S. 509, 513 (1960).

It is axiomatic as appellant recognizes (Br. 10), that although the classification of state-created rights and the weighing of relative priorities of liens under the Code are matters of federal law, the courts must nonetheless look to state law to determine the legal rights and interests in issue. Aquilino v. United States, supra; United States v. Durham Lumber Co., 363 U.S. 522 (1960); Riddell v. Guggenheim, 281 F. 2d 836 (C.A. 9, 1960). As the Supreme Court stated in Aquilino, pp. 512-514:

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute." Morgan v. Commissioner, 309 U.S. 78, 82. Thus, as we held only two Terms ago, Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law" United States v. Bess, 357 U.S. 51, 55. However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property." (Footnotes omitted; emphasis supplied.)

And that statement frames the issue here, viz., what interest or right, if any, did taxpayer have in his mother's trust, and who or what court is the final arbiter of that question. The appellant contends (Br. 14-23) that the taxpayer was without any rights or interests in the trust to which the Government's lien could attach and points to (Br. 6-9) the decision of the State Surrogate's Court to support that conclusion. Both the conclusion and its underlying support, however, are erroneous.

B. The Surrogate's Court was without jurisdiction over the United States

It is elementary in our jurisprudential system, that the United States, as sovereign, may not be sued without its consent and the terms of its consent define the court's jurisdiction. United States v. Sherwood, 312 U.S. 584 (1941); United States v. Lee, 106 U.S. 196 (1882). Despite the pervasive nature of the doctrine of sovereign immunity, appellant contends (Br. 8-12) that the United States was a proper party in the Surrogate's Court and that the decision rendered by that court was pursuant to an adversary hearing. Neither the District Court, nor the Surrogate's Court, however, agrees with that contention. As the District Court found (R. 50) the United States appeared specially before the Surrogate's Court solely to contest that court's jurisdiction. The District Court also found (R. 51) that "the will construction was ex parte". This finding is beyond doubt when the Surrogate's Court opinion itself is examined. In that opinion--In re Will of Duncan, 362 N.Y. Supp. 2d 788 (1974)--the Surrogate stated (p. 790):

This court therefore finds that it does not have the authority or jurisdiction, to vacate, annul, cancel or discharge the levy served upon the trustee. * * *

Although this court is without jurisdiction and power to determine the validity of the levy, it maintains jurisdiction over the Last Will and Testament of the deceased and the construction and effect of any provisions of said Last Will and Testament.

The Surrogate's decision not only is contrary to appellant's contention that the proceeding was adversary in nature, but also refutes the contention (Br. 8-10) that the United States was a proper party. The Surrogate stated (p. 790):

The initial issue confronting this court is whether this court has jurisdiction to vacate, cancel or discharge the levy served on the trustee by the Internal Revenue Service. The law is well settled that the United States in filing a proof of claim in a probate proceeding, implicitly consents to the jurisdiction of the probate court to determine the validity of its claim. The levy filed in the instant matter, however, is not concerned with proceedings pertaining to the judicial settlement of the Last Will and Testament of Margaret C. Duncan, but rather concerns the property rights, if any, of Thomas W. Doran, one of the possible beneficiaries of the trust.

The affirmative act of filing a proof of claim invokes the jurisdiction of the Surrogate Court to direct the distribution of estate assets in accordance therewith. The cases cited and relied upon by the petitioner concern themselves with the determination of claims by the government in probate proceedings, and not with actions with respect to creditor's rights to a beneficiary's interest thereunder.

A levy served, as in this case, after the conclusion of the probate proceedings, effects an administrative seizure of assets and no authority of any court is necessary to give weight or legitimacy to its effect. U. S. v. Eiland, 223 F. 2d 118 (Fourth Circuit 1955). The United States Congress has provided an adequate remedy by an aggrieved party to attack a levy which is claimed to be wrongfully asserted. Sec. 7426(a) of the Internal Revenue Code of 1954 provides petitioner with this remedy. Judicial interpretation of this section indicates that this remedy is to be pursued only in the Federal District Court. To decide that this court has jurisdiction or power to determine this issue would exceed its powers and jurisdiction conferred upon it by the New York State constitution and the statutes enacted therein. [Emphasis supplied.]

Accord, In re Drew's Estate, 171 N.Y. Supp. 2d 171 (1958).

Thus, the appellant's contention that the decision of the Surrogate's Court is somehow binding on the United States since the court had jurisdiction over the Government and the decision emanated from an adversary proceeding is fully refuted by the very decision of the Surrogate's Court upon which the appellant relies.

- C. In looking to state decisional law to determine what property or rights to property exist for application of federal taxing statutes, the federal courts are bound only by the decisional law pronounced by the highest court of the state

The ex parte decision of the Surrogate's Court could not, and did not, determine whether the taxpayer had a property interest in the testamentary trust established by his mother. In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the issue presented was the effect to be given by a federal court to a decision by a New York state intermediate court regarding the validity of a release of a power of appointment by a decedent over a trust created in New York. The taxpayer filed a petition in the Supreme Court of New York to obtain a decision on the validity of that release, and when the state intermediate court held the release a nullity--thereby qualifying the corpus of the trust for the marital deduction--the Tax Court looked to that decision in holding for the taxpayer. This Court in a divided opinion (Judge Friendly, dissenting) affirmed (363 F. 2d 1009) stating at p. 1013, the "New York judgment, rendered by a court which had jurisdiction over the parties and subject matter, authoritatively settled the rights of the parties, not

only for New York, but also for purposes of the application of those rights of the relevant provisions of federal tax law." The Commissioner appealed and the Supreme Court reversed. In so doing, Mr. Justice Clark, speaking for the Court stated (p. 465):

Moreover, even in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. King v. Order of Travelers, *supra*, at 160-161. And in West v. A. T. & T. Co., 311 U.S. 223 (1940), this Court further held that "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. At 237. (Emphasis supplied.) Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should a fortiori not be controlling. This is but an application of the rule of Erie R. Co. v. Tompkins, *supra*, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). (First emphasis in original; second, supplied.)

See also, Robinson v. United States, 518 F. 2d. 1105, 1108 (C.A. 9, 1975); Cox v. United States, 421 F. 2d 576, 583 (C.A. 5, 1970).

Faced with this dispositive language, appellant here attempts to side-step the Bosch decision, by stating (Br. 7-8) that the state proceeding was in rem. This attempt at avoiding Bosch is devoid of merit. Appellant bases (Br. 9) his in rem distinction on two cases which on their facts are clearly inapposite and on one which is actually contrary to his contention. The case of United States v. Bleasby, 257 F. 2d 278 (C.A. 3, 1958), relied on by appellant was decided prior to Bosch, and by the only circuit (Third) which prior to Bosch gave effect to decisions of state courts other than the highest court of the state. See, dissent Commissioner v. Estate of Bosch, 363 F. 2d 1009. (C.A. 2, 1966). Therefore, Bleasby, being pre-Bosch, absent other factors, is no longer good precedent. Additionally, and apart from Bosch, Bleasby is clearly distinguishable from the case at bar since that case involved the special area of contraband. The taxpayer in Bleasby was a bookmaker who was no longer the owner of the property when the federal tax lien attached. The state of New Jersey was in possession of the subject property possessed of state rights to retain the property by forfeiture. The State of New Jersey v. Moriarty, 268 F. Supp. 546 (N.J., 1967), also cited by appellant was based upon the same set of facts as those in Bleasby, viz., the seizure of gambling proceeds by the state, a New Jersey forfeiture statute, and a subsequent lien by the United States. Relying on Bleasby, the District Court

held that state court proceeding involving forfeiture bound all parties including the United States. The third case cited by appellant--Stapelton v. \$2,438,110, 454 F. 2d 1210 (C.A. 3, 1972)--also concerned the same New Jersey forfeiture statute that appeared in Bleasky and Moriarty. In this case, however, the United States obtained possession of the property prior to the state and the Third Circuit found that fact significant in reversing the District Court. The most significant aspect of Stapleton from the point of view of the instant litigation was the Court's ultimate finding that (p. 1214):

It is settled law that a suit directly concerning the title to property in which the United States has an interest is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court.

Language more destructive to appellant's claim could hardly be found.

Finally, it must be noted that the instant action was treated by the Surrogate as one of will construction. In Bosch, the taxpayer petitioned the state court for a similar purpose--to determine the validity of the release of a power of appointment obtained by the wife from her deceased husband.^{2/} It is difficult

^{2/} The companion case to Bosch was Second National Bank of New Haven v. United States, 387 U.S. 456 (1967), which also concerned the effect to be given a state probate court's decree in matters involving federal taxes. The Supreme Court affirmed in Second National Bank the lower court's finding that "decrees of the Connecticut Probate Court * * * under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. 446, 457. This Court agreed with this finding. 351 F. 2d 489, 494.

to distinguish the present situation from Bosch,^{3/} and as the District Court here held (R. 51) regarding appellant's in personam-in rem distinction, "If the plaintiff's contention were upheld, then questions of federal tax liability could be routinely and conclusively decided by lower state courts. Such a procedure does not stand up under the guidelines of the Bosch case."^{4/}

- D. The District Court having no state decisional law by which it was bound, correctly decided, in keeping with similar state decisions, that taxpayer had a right to property under New York law to which the Government tax levy could attach

Having demonstrated, supra, that the Surrogate's Court lacked jurisdiction over the United States and that its decision, not being pronounced by the state's highest court, had no binding effect upon the Federal District Court, the Bosch decision provides the framework within which the District Court acted. For as Bosch stated (p. 465), "If there be no decision by [the highest state] court then federal authorities must apply what they find

^{3/} It is worthy of note that the state court proceeding in Bosch could have been brought in the Surrogate's Court as was the instant case, since the Supreme Court and the Surrogate's Court have concurrent jurisdiction over such matters. Dunham v. Dunham, 337 N.Y. Supp. 2d 728 (1972).

^{4/} See also the discussion by the State Court of Appeals on the in rem--in personam distinction in Matter of Rosenberg, infra, pp. 20-22.

to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." The District Court below, faced with the lack of a decision by the highest court of New York on the issue before it, was required to sit as a "state court" and to decide the issue as a state court might. We turn next to that decision.

The District Court found (R. 56-57) that even where the trustee is granted discretion over amounts to be distributed among beneficiaries, as long as the trustee is required to pay some income to him, a beneficiary can compel the trustee to exercise his discretion reasonably, and, as such, the beneficiary has "a right to property" under New York law. This proposition is clearly correct and supported by decisions of the state courts.

The will states (R. 52):

My Trustee shall pay over or use, apply and expend whatever part, or all of the new income or principal (even to the point of exhaustion thereof), or both thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of said family group. (Emphasis supplied.)

The language contained in the trust imposes the mandatory duty upon the trustee to pay over either income, principal or both "to the individual members of said family group." The trust by referring to the "individual members" of a named group clearly directs that all members of the group receive something, although not necessarily equal amounts. The trustee's discretion is not

to determine who gets something, but rather, how much each is to be given. The situation here is quite different from that in Hamilton v. Drogo, 241 N.Y. 401 (1926), a case in which appellant places great store. (Br. 14, 16, 18, 19.) In Hamilton v. Drogo, supra, the will provided that the trustees use the trust income "for the maintenance and support or otherwise, for the benefit of all or any one or more exclusively of the other or others of him * * * as my * * * trustees in their sole and uncontrolled discretion * * * think fit." (241 N.Y., p. 403.) The distinction between the two provisions is manifest. In the instant case the trustee may vary the amounts among beneficiaries, but "the individual members" must receive something if need exists. In Drogo, the trustee's discretion was not so limited; he was free to distribute income to "one or more exclusively of the other or others." Ten years after Drogo the New York Court of Appeals had the opportunity to place Drogo in its proper context. In Matter of Sand v. Beach, 270 N.Y. 281 (1936), the New York court stated that in Drogo the use of the terms "or" and "exclusively" granted the trustee discretion in excluding any member or members of the class from receipt of income. The court went on to state (p. 285):

Thus choice of the person for whose benefit the income of the fund should be applied rested solely with the trustee. * * *

Here the situation is quite different. The trustee cannot, in the exercise of his discretion, apply the income of the trust fund exclusively for the benefit of the wife of the judgment creditor [debtor].

And (p. 286):

No person can be given a right to the use of income free from claims of his creditors. The test is only whether the judgment debtor has a right to the use of the income.

Since it is apparent from the terms of the trustee's powers that his discretion exists only in determining the amount each beneficiary receives, it follows that a beneficiary who is excluded entirely would have a cause of action against the trustee for an abuse of discretion. Ireland v. Ireland, 84 N.Y. 321 (1881); In re Freeman's Will, 243 N.Y. Supp. 2d 973 (1963). In Freeman's Will, supra, the trustee had sole discretion in determining the size of the monthly payments of the lifetime beneficiary of a testamentary trust. The trustee paid him \$400 per month and the beneficiary brought suit stating such an amount was inadequate. The court stated (p. 975):

It is well settled in law that where the amount to be paid to a beneficiary of a Trust is left to the discretion of the Trustee, the Court shall not determine the amount to be paid to the beneficiary, unless there is an abuse, or an unreasonable exercise of discretion, exercised by trustee, which requires modification.

The Court in Freeman's Will determined \$400 per month was an "unreasonable exercise of discretion" and that therefore a figure of \$6,000 per year should be distributed to the beneficiary.

In Collister v. Fassitt, 163 N.Y. 281 (1900), the trustee was given the discretion to use as much of the property in trust for the support and benefit of the settlor's neice as the trustee should, from time to time "think best". The Court

held (p. 290-291) that the beneficiary had a right in the trust and a cause of action against the trustee for failure to exercise his discretion in a reasonable manner. The court held in favor of the beneficiary on the issue of the trustee's discretion. See also, In re Schirrmeister's Estate, 169 N.Y. Supp. 2d 130 (1957); In re Chusid's Estate, 301 N.Y. Supp. 2d 766 (1969).

This Court affirmed the decision of the Tax Court in Estate of Ford v. Commissioner, 53 T.C. 114 (1969), aff'd per curiam, 450 F. 2d 878 (C.A. 2, 1971), where the issue of the rights of a trust beneficiary vis-a-vis the trustee under New York law was considered. The Tax Court's findings on that issue were unequivocal, stating (pp. 126-127):

Moreover, an examination of the applicable State law reveals that an aggrieved beneficiary could indeed enforce his rights against an imprudent or wrongdoing trustee. There is an abundance of New York authority stating that a trustee owes a duty of equal loyalty to all beneficiaries. See for example: Matter of Dickson's Estate, 38 Misc. 2d 678, 237 N.Y.S. 2d 572 (N.Y. Co. Surr. Ct. 1963); Matter of Hernrich's Will, 195 Misc. 803, N.Y.S. 2d 875 (Monroe Co. Surr. Ct. 1949); and Matter of James Estate, 86 N.Y.S. 2d 78, 89 (N.Y. Co. Surr. Ct. 1948). [Footnotes omitted.]

Cf. Leopold v. United States, 510 F. 2d 617, 620-621 (C.A. 9, 1975).

One further case passed on by the highest court of New York deserves mention here, for, we submit its underlying rationale greatly supports the District Court's decision. In Matter of Rosenberg, 269 N.Y. 247 (1935), the issue was whether the

United States had a right to enforce its tax lien in the Surrogate's court against the life beneficiary of a spend-thrift trust created by will. The Surrogate refused the allowance of the federal claim and that disallowance was affirmed by the Appellate Division of the Supreme Court. The Court of Appeals reversed, stating (pp. 250-251), "A person may not ordinarily have ownership of or right to enjoy property and at the same time be able to keep it from the claims of creditors and others." And, in language highly relevant to the instant question, the court stated (pp. 251-252):

It is by no means certain that our State policy excludes payment of State taxes and other possible claims by the State from the category of necessary support. A tax in some form nowadays is at least as certain as, say, medical or legal expenses.

However that may be, it is certain that no policy of this State may interfere with the power of Congress to levy and collect taxes on income. * * *

* * *
If the right or interest which the beneficiary here has in the income of the trust may be said to fall within the sweeping limits of the phrase "all property and rights to property, whether real or personal, belonging to such person", then we see no reason to doubt the validity of the appellant's contention. It is true the legal estate is in the trustee. Nevertheless, "the whole beneficial proprietorship, or interest, is in the cestui que trust, for whom he holds the estate and who has the right to enforce the performance of the trust." (Metcalf v. Union Trust Co., 181 N.Y. 39, 44.) To say that right is not a right to property within the meaning of the United States Code, Title 26, section 115, because equity acts in personam and not in rem, would be mere legalism and would disregard the plain language and what we think is the plain intendment of the statute. [Emphasis supplied.]

The Rosenberg case supports the District Court's decision on numerous ground. First, it classifies "taxes" as falling within the definitional term "support." In the instant case, taxpayer was to be paid an amount "necessary in order to provide comfortable support * * * to the individual members of the said family group." Thus, under Rosenberg, the taxes owed by taxpayer must be considered by the trustee in determining the support payments to him. Second, the highest court of the state recognizes the pervasive nature of the federal tax lien and has articulated that no policy of the state may interfere with that power. Third, the decision flatly states that although the trustee is vested with the legal title in the trust and the discretion in administering it, the beneficiary has the right to enforce performance of the trust. Fourth, the court held that that "right" is property within the language of the federal lien statute. And, fifth, the in rem and in personam distinction is totally irrelevant.

Based upon the language in Rosenberg, language which was uncompromising in its terms, and the holdings of other state court cases cited herein, the finding of the District Court that the taxpayer had a right to property under New York law was correct and should be affirmed.

CONCLUSION

For the reasons stated above, the decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 30th day of September, 1976, in an envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6331. LEVY AND DISTRAINT.

(a) Authority of Secretary or Delegate.--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

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SEC. 6332(a). [as amended by Sec. 104(b)(1), Federal Tax Lien Act of 1966, supra] SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.--Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

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